No. 73-905

APR

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAZEL M. TALBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals wrote no opinion. Its order affirming the conviction (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1973. Petitioner's timely motion for rehearing was denied by the court of appeals on November 14, 1973. The petition for a writ of certiorari was filed on December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to deny the defense motion for discovery of information gathered by the government on prospective jurors.

2. Whether it was error for the trial court to fail to ask prospective jurors certain *voir dire* questions propounded by petitioner.

3. Whether it was error for the trial court to deny petitioner's motion for sequestration of witnesses.

4. Whether a mistrial should have been declared after the government dismissed one of the two indictments at the close of its case.

5. Whether the jury was erroneously charged.

6. Whether petitioner was properly charged as an aider and abettor.

7. Whether petitioner's sentence to three years' imprisonment was unlawful.

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on five counts of aiding and abetting the cashing of stolen travelers' checks, in violation of 18 U.S.C. 2314 and 2. Petitioner was sentenced to five concurrent terms of three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. B).[1]

In the fall of 1969, petitioner entered into an agreement with Loren Nauss, a part-time bank employee, whereby Nauss was to steal travelers' checks from the bank at which he worked and turn them over to petitioner, who would dispose of them and pay him a part of the proceeds (Tr. 57-58, 61-62, 75-77).

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[1]There were two indictments involving petitioner: No. 72-300, which named Nauss, Jett and petitioner as defendants and referred to checks cashed in July of 1970, and No. 72-298, which named the same three and Charles Durden and referred to checks cashed in February 1970. The latter indictment was subsequently dismissed (see p. 5, *infra*) (Pet. 6-8).

In December 1969, Nauss actually stole some checks and delivered them to petitioner (Tr. 60, 63-64). Petitioner offered the checks to his roommate, Weldon Jett, Jr., on condition that Jett cash them and give part of the money to him (Tr. 130-132, 137). Accepting the offer, Jett, in turn, agreed to give some of the checks to Charles Durden, who was to cash them and return a portion of the money to Jett, who then would pass on a percentage of that money to petitioner (Tr. 148-150).

Later, becoming frightened, Jett decided not to cash any more of the checks personally (Tr. 146), but entered into an agreement with Bucky Dudley whereby Dudley was to use the checks for personal purchases and split any change from his purchases with Jett (Tr. 144-147).

ARGUMENT

1. Petitioner contends (Pet. 10-11) that the trial court erred in denying his request for discovery of information gathered by the government on prospective jurors. In *Brady* v. *Maryland*, 373 U.S. 83, 87, on which he relies, this Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution" (emphasis added). The information sought here was not material to guilt or punishment and its disclosure was not required under *Brady*.

2. Petitioner contends (Pet. 11-15) that the trial court erred when it did not ask some of the *voir dire* questions he had propounded. Of the thirty-four questions submitted by petitioner, approximately one-half were presented by the court to the jury in substantially the same form as they had been submitted by petitioner (Tr. 5-7, 11-12, 15). These questions provided a more than adequate test of the qualifications and competency of the jurors. Many of

the remaining questions involved the conduct of grand jury and courtroom proceedings, burden of proof, reasonable doubt, and presumption of innocence. The court properly deferred discussion of these legal principles until the jury was charged (Tr. 368-392).

The trial court is vested with broad discretion regarding the questions to be asked prospective jurors on *voir dire*. See, *e.g.*, *Lowther* v. *United States*, 455 F. 2d 657 (C.A. 10); *United States* v. *Linn*, 438 F. 2d 456 (C.A. 10); *Haslam* v. *United States*, 431 F. 2d 362 (C.A. 9), opinion adhered to 437 F. 2d 955, certiorari denied, 402 U.S. 976. The court clearly acted within the limits of its proper discretion in this case.

3. Petitioner claims (Pet. 15-18) that it was error for the trial court to deny his motion for sequestration of witnesses. Sequestration of witnesses is also a matter within the sound discretion of the trial judge. "[T]his ruling will not be reversed 'in the absence of manifest prejudice resulting from the presence of witnesses during the trial of the case.' " *United States* v. *Harris*, 409 F. 2d 77, 81 (C.A. 4), certiorari denied, *sub nom. Brown* v. *United States*, 396 U.S. 965, citing *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10). Petitioner has failed to show how the denial of his request for sequestration resulted in "manifest prejudice." His claim of error rests entirely on the change of testimony of the unsequestered witness Durden. Petitioner alleges that Durden, after first stating that Jett had given him the stolen travelers' checks, later testified, after hearing the testimony of others, that Jett sold them to him (Tr. 218). The means by which Jett transferred these checks to Durden is immaterial, since the evidence at trial clearly established that petitioner delivered the stolen checks to Jett in exchange for a percentage of the face value of the checks (Tr. 137).

Once defense counsel expressed surprise at the change in Durden's testimony, moreover, the court granted counsel considerable latitude in cross-examining him, although he was the defendant's witness (Tr. 286-295). To the extent that the evidence was relevant, the jury consequently had before it an adequate record on which to assess the credibility of the witness.

4. Petitioner contends (Pet. 18-20) that the trial court erred in refusing to declare a mistrial after the government dismissed indictment No. 72-298 (see note 1, *supra*) at the close of its case, on the ground that the government had deliberately delayed dismissal to permit prejudicial evidence to be adduced. Petitioner has presented no evidence to support this attribution of motives and the record reflects that the decision to dismiss indictment No. 72-298 was not made in advance, but was only made at the close of the government's case (Tr. 198). Moreover, the trial court explained the meaning of that dismissal and instructed the jury not to consider the charges of the dismissed indictment during deliberation (Tr. 368-369).

Petitioner also claims that he was "tricked" into calling Durden to the witness stand. This is not so. Once indictment No. 72-298 was dismissed, the government did not need to proceed with that part of the case as to which Durden, who had pleaded guilty in No. 72-298, would have been a witness. Petitioner's decision thereafter to call Durden as his own witness was entirely his own.

5. Petitioner also contends (Pet. 20-22) that the denial of his motion to make the opening and closing argument was a violation of due process. However, the prosecution "has the right and the duty" to make the opening statement in order "to explain to the jury the issue or issues to be tried." 5 Wharton's *Criminal Law and Procedure*, §2032 (12th ed.). The order of summing up varies from one

jurisdiction to another. The "prevailing practice," however, is to let the government make the closing argument. See *id.* at §2077. The court clearly did not commit reversible error in following the traditional order of argument.

6. Petitioner further contends (Pet. 23-24) that the trial court erred by instructing the jury on conspiracy although no conspiracy was charged, thereby enabling the jury to convict him of conspiracy. The trial court, however, did not instruct the jury on conspiracy. The portion of the charge to which petitioner refers was an instruction on aiding and abetting. Nowhere in the course of that instruction is "conspiracy" mentioned or impliedly charged, nor was petitioner convicted of conspiracy.

7. Relying in large measure on *United States* v. *Falcone*, 311 U.S. 205, petitioner asserts that "a seller of goods which the seller knows are to be used in an unlawful manner [cannot be] * * * an aider and abettor" (Pet. 31). In *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709, however, this Court stated that *Falcone* did not hold, as petitioner contends, "that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end." *Falcone* created "no such sweeping insulation for sellers to known illicit users" (*ibid*); it only meant "that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy." (*ibid.*). In upholding the conviction of a mail-order drug corporation for selling suspiciously large quantities of morphine sulphate to physicians whom it had been told were involved in illicit drug traffic, the Court stressed that, in *Direct Sales*, in contrast to *Falcone*, the goods sold were

"inherently" more "susceptib[le] to harmful and illegal use" and thus by "their very nature" gave "the seller notice the buyer will use them unlawfully." (*Id.* at 710). Known stolen checks similarly provide notice of unlawful purpose. Indeed, petitioner delivered the checks to Jett with the clear understanding that they were to be used illegally for their mutual profit.

8. Petitioner finally contends (Pet. 32-40) that the sentence he received violated his constitutional rights. Petitioner was tried and convicted on five counts of an indictment charging aiding and abetting the transportation of forged travelers' checks in interstate commerce, in violation of 18 U.S.C. 2314 and 2.[2] He faced a maximum penalty of fifty years' imprisonment and a $50,000 fine, but was sentenced only to three years' imprisonment. Petitioner's co-defendants, Durden and Jett, who pleaded guilty to lesser charges, received lesser punishments. No provision of the Constitution requires that a defendant found guilty of five counts receive the same sentence as defendants found guilty of only one.[3]

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[2]Section 2314 provides for a maximum penalty of a $10,000 fine and ten years' imprisonment.

[3]The record reflects the court's sensitivity to the issue of sentencing. At sentencing the judge stated:

> Now, I have talked more than I have than I can ever remember, but this case has given me about as much concern as any that I've tried in fifteen or twenty years because fundamentally these boys lives are ahead of them and I know it. (Tr. Sen. 19).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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